

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:PEN:PIT:TL-N-1195-00

EJLaubach

date:

to: James Schrmack
Group Manager, Group 1710

from: Associate District Counsel, Pennsylvania District, Pittsburgh

subject: Consent to Extend Statutory Period for Assessment For Corporation
Merged into a Limited Liability Company

re:

EIN: [REDACTED]

THIS DOCUMENT MAY CONTAIN TAXPAYER INFORMATION SUBJECT TO SECTION 6103. THIS DOCUMENT MAY ALSO CONTAIN CONFIDENTIAL INFORMATION SUBJECT TO THE ATTORNEY-CLIENT AND DELIBERATIVE PROCESS PRIVILEGES AND MAY ALSO HAVE BEEN PREPARED IN ANTICIPATION OF LITIGATION. THEREFORE, THIS DOCUMENT SHALL NOT BE DISCLOSED TO TAXPAYERS OR THEIR REPRESENTATIVES OR DISCLOSED OR CIRCULATED BEYOND OFFICE PERSONNEL HAVING THE REQUISITE "NEED TO KNOW."

Revenue Agent Jerry Szmyd has asked our advice:

ISSUE

Who is the proper party to sign a Form 872, Consent to Extend the Statute of Limitations on Assessment, for a Delaware business corporation which merged into a limited liability company under Delaware law?

CONCLUSION

Under Delaware law, the survivor of a merger between a business corporation and a limited liability company becomes liable for the debts of the predecessor corporation. Therefore, the limited liability company can sign a Form 872 consent as the successor in interest to the corporation.

FACTS

████████████████████, hereinafter called ██████████, filed a consolidated income tax return with its ██████████ controlled subsidiaries for the taxable year ended September 30, ██████████. ██████████ was a business corporation organized under the laws of Delaware in ██████████.

On ██████████, ██████████ and most of its subsidiaries merged into newly created limited liability companies (LLCs) under Delaware law. The shareholders of the old corporations became the members of the new LLCs. Although these transactions were treated as a liquidation of ██████████ for tax purposes, for state law purposes, ██████████ merged into the newly created LLC known as ██████████ with ██████████ being the survivor.

The income tax return of ██████████ for the taxable year ended September 30, ██████████, is presently under examination. The revenue agent needs to secure a consent to extend the statute of limitations on assessment for this year but he is uncertain who should sign the consent. ██████████ no longer exists as of ██████████, since it has now been replaced by the new LLC. The agent questions whether the old officers of ██████████ or the new managers of the LLC should sign the Form 872 consent or whether he should obtain a transferee agreement from ██████████ for this period. He has asked our advice on this issue.

LEGAL DISCUSSION

Under I.R.C. § 6501(c)(4) the statutory period of assessment can be extended by an agreement in writing entered into before the period of assessment expires. In the present case, the revenue agent needs to extend the statutory period of assessment for ██████████'s taxable year ended September 30, ██████████. But ██████████ ceased its corporate existence in ██████████ when it merged into a new LLC with the LLC becoming the surviving entity. The agent therefore questions who can sign a Form 872 consent to extend the statute of limitations on assessment for ██████████'s taxable year ended September 30, ██████████.

Although the conversion of ██████████ from a corporation to a LLC was treated as a liquidation of ██████████ for tax purposes, in reality, ██████████ was merged into ██████████ under Delaware state law and that entity became the survivor. Under Delaware law, such a merger between a corporation and a LLC is permissible under 6 Del. C. § 18-209(b). This provision states

that a LLC can merge or consolidate with another LLC or other "business entity" (which definition includes corporations, trusts, or partnerships) formed under Delaware or another state law.

Section 18-209(g) of the Delaware LLC law further provides that "all debts, liabilities and duties of each of the said domestic limited liability companies and other business entities that have merged or consolidated shall thenceforth attach to the surviving or resulting domestic limited liability company or other business entity, and may be enforced against it to the same extent as if said debts, liabilities, and duties had been incurred or contracted by it." Thus, [REDACTED] became the successor in interest to [REDACTED] in [REDACTED] and is primarily liable after the merger for the debts of [REDACTED].

The authority to execute a consent to extend the statutory period of assessment is determined under state law. See Pleasanton Gravel Co. v. Commissioner, 85 T.C. 839 (1985). Since [REDACTED] became primarily liable for the debts of [REDACTED] after their merger, then [REDACTED] has the power under state law to extend the period of limitations for its own direct liability just as its predecessor, [REDACTED], would have had.

Accordingly, we believe that the proper party to sign a Form 872 consent is [REDACTED]. The proper caption on the Form 872 consent should be "[REDACTED] (EIN: [REDACTED]), as successor in interest to [REDACTED] (EIN: [REDACTED])." If you have any questions, please call Attorney Edward J. Laubach, Jr. at 412-644-3443.

EDWARD F. PEDUZZI, JR.
Associate District Counsel